formal legislative declaration, broadly interpreted by our courts, with due regard to our peculiar institutions, would set at rest much controversy as to the legal right of capital and labor.

HARRISON H. BRACE.

Supreme Court of the United States.

EX PARTE BAIN, JR.

The declaration of Article V. of the Amendments to the Constitution, that "no person shall be held to answer for a capital, or otherwise, infamous, crime, unless on a presentment or indictment of a grand jury," is jurisdictional, and no court of the United States has authority to try a prisoner without indictment or presentment in such cases.

The indictment here referred to is the presentation to the proper court, under oath, by the grand jury, duly impanelled, of a charge describing an offence against the law for which the party charged may be punished.

When this indictment is filed with the court, no change can be made in the body of the instrument by order of the court, or by the prosecuting attorney, without a resubmission of the case to the grand jury. And the fact that the court may deem the change immaterial, as striking out of surplus words, makes no difference. The instrument, as thus changed, is no longer the indictment of the grand jury which presented it.

This was the doctrine of the English courts under the common law. It is the uniform ruling of the American courts, except where statutes prescribe a different rule, and it is the imperative requirement of the provision of the constitution above recited, which would be of little avail if an indictment once found can be changed by the prosecuting officer, with the consent of the court, to conform to their views of the necessities of the case.

Upon an indictment so changed the court can proceed no further. There is nothing in the language of the constitution, which the prisoner can "be held to answer." A trial on such indictment is void. There is nothing to try.

According to principles long settled in this court the prisoner, who stands sentenced to the penitentiary for such trial, is entitled to his discharge by writ of *habeas corpus*.

ON Petition for a writ of *habeas corpus*.

The opinion of the court was delivered by

MILLER, J.—This is an application to this court for a writ of *habeas corpus* to relieve the petitioner, George M. Bain, Jr., from the custody of Thomas W. Scott, United States Marshal for the Eastern District of Virginia. The original petition set out with particularity proceedings in the Circuit Court of the United States for that district, in which the petitioner was convicted under Section 5209 of the Revised Statutes, of having made a false report or statement as cashier of the Exchange National Bank of Nor-

folk, Virginia. The petition has annexed to it as an exhibit all the proceedings, so far as they are necessary in the case, from the order for the impanelling of a grand jury to the final judgment of the court sentencing the prisoner to imprisonment for five years in the Albany penitentiary. Upon this application the court directed a rule to be served upon the marshal to show cause why the writ should not issue, to which that officer made the following return: "Comes the said Scott, as marshal aforesaid, and states that there is no sufficient showing made by the said Bain that he is illegally held and confined in custody of respondent; but, on the contrary, his confinement is under the judgment and sentence of a court having competent jurisdiction to indict and try him, and he should not be released; and respondent prays the judgment of this court, that the rule entered herein against him be discharged, and the prayer of the petition be denied." The Attorney-General of the United States, and the District Attorney for the Eastern District of Virginia, appeared in opposition to the motion, and thus the merits of the case were fully presented upon the application for the issue of the writ.

Upon principles which may be considered to be well settled in this court, it can have no right to issue this writ as a means of reviewing the judgment of the circuit court simply upon the ground of error in its proceedings; but if it shall appear that the court had no jurisdiction to render the judgment which it gave, and under which the petitioner is held a prisoner, it is within the power and it will be the duty of this court to order his discharge. The jurisdiction of that court is denied in this case upon two principal grounds. The *first* of these relates to matters connected with the impanelling of the grand jury, and its competency to find the indictment under which the petitioner was convicted; the *second* refers to a change made in the indictment, after it was found, by striking out some words in it, and then proceeding to try the prisoner upon the indictment as thus changed. We will proceed to examine the latter ground first.

Section 5209 of the Revised Statutes of the United States, under which this indictment is found, reads as follows: "Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts or wilfully misapplies any of the moneys, funds or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the asso-

ciation ; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree ; or who makes any false entry in any book, report or statement of the association, with intent, in either case, to injure or defraud the association, or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association or any agent appointed to examine the affairs of any such association ; and every person who with like intent aids or abets any officer, clerk or agent in any violation of this section—shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years or more than ten." Section 5211 requires every banking association organized under this Act of Congress to " make to the comptroller of the currency not less than five reports during each year, verified by the oath or affirmation of the president or cashier of such association, and attested by the signatures of at least three of the directors."

The indictment in this case, which contains but a single count, and is very long, sets out one of these reports, made on the seventeenth day of March 1885, by the petitioner, as cashier, and Charles E. Jenkins, John B. Whitehead and Orlando Windsor, as directors, of the Exchange National Bank of Norfolk, a national banking association. The indictment also points out numerous false statements in this report, which, it is alleged in the early part of it, were made " with intent to injure and defraud the said association, and other companies, bodies politic and corporate, and individual persons to the jurors aforesaid unknown, and with the intent then and there to deceive any agent appointed by the comptroller of the currency, to examine the affairs of such association. Following this allegation come the specifications of the particulars in which the report is false, and the concluding part charges that the defendants, " and each of them, did then and there well know and believe the said report and statement to be false to the extent and in the mode and manner above set forth ; and that they and each of them, made said false statement and report in manner and form as above set forth with intent to deceive *the comptroller of the currency* and the agent appointed to examine the affairs of said association, and to injure, deceive, and defraud the United States and said association and the depositors thereof, and other banks and national banking associations, and divers other persons and

associations to the jurors aforesaid unknown, against the peace of the United States and their dignity, and contrary to the form of the statute of the said United States in such cases made and provided."

The defendants having been permitted to withdraw the pleas of not guilty, which they had entered, were then allowed to demur to the indictment, and, as it is important to be accurate in stating what was done about this demurrer the transcript of the record on that subject is here inserted:

"*United States* v. *Geo. M. Bain, Jr., John B. Whitehead, Orlando Windsor, and C. E. Jenkins.*

"Indictment for making false entries, etc.

"This day came the parties, by their attorneys, pursuant to the adjournment order entered herein on the 13th day of November 1886, and thereupon the defendants, by their counsel, asked leave to withdraw the pleas heretofore entered; which being granted, they submitted their demurrer to the indictment, which, after argument, was sustained; and thereupon, on motion of the United States by counsel, the court orders that the indictment be amended by striking out the words '*the comptroller of the currency and,*' therein contained. Thereupon, on motion of John B. Whitehead and C. E. Jenkins, by their counsel, for the severance of trial, it was ordered by the court that the case be so severed that George M. Bain, Jr., cashier and director, be tried separately from John B. Whitehead, Orlando Windsor, and C. E. Jenkins, directors. Thereupon, the trial of George M. Bain, Jr., was taken up, and the said defendant, George M. Bain, Jr., entered his plea of not guilty."

This was done December 13th, 1886, thirteen months after the presentment of the indictment by the grand jury, and probably long after it had been discharged. A verdict of guilty was found against Bain, a motion for a new trial was made, and then a motion in arrest of judgment, both of which were overruled. The opinion of the circuit judge on the question which we are about to consider, delivered in overruling the motion, is found in the record.

The proposition, that in the courts of the United States any part of the body of an indictment can be amended after it has been found and presented by a grand jury, either by order of the court,

or on the request of the prosecuting attorney, without being resubmitted to them for their approval, is one requiring serious consideration. Whatever judicial precedents there may have been for such action in other courts, we are at once confronted with the fifth of those articles of amendment, adopted early after the Constitution itself was formed, and which were manifestly intended mainly for the security of personal rights. This article begins its enumeration of these rights by declaring that "no person shall be held to answer for a capital, or otherwise infamous, crime unless on a presentment or indictment of a grand jury," except in a class of cases of which this is not one. We are thus not left to the requirements of the common law in regard to the necessity of a grand jury or a trial jury, but there is the positive and restrictive language of the great fundamental instrument by which the national government is organized, that "no person shall be held to answer" for such a crime, "unless on presentment or indictment of a grand jury." But even at common law it is beyond question that in the English courts indictments could not be amended. The authorities upon this subject are numerous and unambiguous. In the great case of *Rex* v. *Wilkes*, 4 Burrow 2527, tried in 1770, which attracted an immense deal of public attention, Wilkes, after being convicted by a jury of having printed and caused to be published a seditious and scandalous libel, was brought up before the court of king's bench, on a motion to set aside the verdict, on the ground that an amendment had been made in the language of the information on which he was tried. In the course of an opinion delivered by Lord MANSFIELD, overruling the motion, he remarks on this subject (page 2569) "that there is a great difference between amending indictments and amending informations. Indictments are found upon the oaths of a jury, and ought only to be amended by themselves; but informations are as declarations in the king's suit. An officer of the crown has the right of framing them originally; he may, with leave, amend in like manner as any plaintiff may do." Mr. Justice YATES, on the same occasion, said that indictments, being upon oath, can not be amended.

Hawkins, in his Pleas of the Crown, book 2, c. 25, § 97, says: "I take it to be settled that no criminal prosecution is within the benefit of any of the statutes of amendments; from whence it follows that no amendment can be admitted in any such prosecution, but such only as is allowed by the common law. And agreeably

hereto I find it laid down as a principle in some books, that the body of an indictment removed into the king's bench from any inferior court whatsoever, except only those of London, can in no case be amended. But it is said that the body of an indictment from London may be amended, because, by the city charter, a tenor of the record only can be removed from thence." He further says, in section 98: "It seems to have been anciently the common practice where an indictment appeared to be insufficient, either for its uncertainty or the want of proper legal words, not to put the defendant to answer it; but if it were found in the same county in which the court sat, to award process against the grand jury to come into court and amend it. And it seems to be the common practice at this day, while the grand jury who found a bill is before the court, to amend it, by their consent, in a matter of form, as the name or addition of the party."

This language is repeated in Starkie, Crim. Pl. 287. There are, however, several cases in which it has been decided that the caption of an indictment may be amended, and we, therefore, give here the language of Starkie (page 258), as describing what is meant by the phrase "caption of an indictment." "Where an inferior court," he says, "in obedience to a writ of *certiorari* from the king's bench, transmits the indictment to the crown office, it is accompanied with the formal history of the proceeding describing the court before which the indictment was found, the jurors by whom it was found, and the time and place where it was found. This instrument, termed a schedule, is annexed to the indictment, and both are sent to the crown office. The history of the proceedings, as copied or extracted from the schedule, is called the caption, and is entered of record, immediately before the indictment." It will be seen that, as thus explained, the caption is no part of the instrument found by the grand jury.

Wharton, in his work on Criminal Pleading and Practice, § 90, says: "No inconsiderable portion of the difficulties in the way of the criminal pleader at common law have been removed in England by 7 Geo. IV., c. 64, §§ 20, 21; 11 & 12 Vict. c. 46, and 14 & 15 Vict. 100; and in most of the states of the American Union, by statutes containing similar provisions." He also cites cases in the English courts, where amendments have been made under those statutes, but they can have no force as authority in this coun-

try, even if they permitted such amendments as the one under consideration.

No authority has been cited to us in the American courts which sustains the right of a court to amend any part of the body of an indictment without reassembling the grand jury, unless by virtue of a statute. On the contrary, in the case of *Com.* v. *Child*, 13 Pick. 200, Chief Justice SHAW says: "It is a well settled rule of law that the statute respecting amendments does not extend to indictments; that a defective indictment cannot be aided by a verdict; and that an indictment had on demurrer must be held insufficient upon a motion in arrest of judgment."

In the case of *Com.* v. *Mahar*, 16 Pick. 120, the court having held, upon the arraignment of the defendant, that the indictment was defective, the Attorney-General moved to amend it, and the prisoner's counsel consented that the name of William Hayden, as the owner of the house in which the offence had been committed, should be inserted, not intending, however, to admit that Hayden was, in fact, the owner. "But the court were of opinion that this was a case in which an amendment could not be allowed, even with the consent of the prisoner."

In the case of *Com.* v. *Drew*, 3 Cush. 279, Chief Justice SHAW said: "Where it is found that there is some mistake in an indictment, as a wrong name or addition, or the like, and the grand jury can be again appealed to, as there can be no amendment of an indictment by the court, the proper course is for the grand jury to return a new indictment, avoiding the defects of the first."

In the case of *State* v. *Sexton*, 3 Hawks 184, the Supreme Court of that state said: "It is a familiar rule that the indictment should state that the defendant committed the offence on a specific day and year, but it is unnecessary to prove, in any case, the precise day and year, except where the time enters into the nature of the offence. But if the indictment lay the offence to have been committed on an impossible day, or on a future day, the objection is as fatal as if no time at all had been inserted. Nor are indictments within the operation of the statutes of jeofails, and can not therefore be amended. Being the finding of a jury upon oath, the court cannot amend without the concurrence of the grand jury by whom the bill is found. These rules are too plain to require authority, and show that the judgment of the court was right, and must be affirmed." It will be perceived that the amendment in

that case had reference to a matter which the law did not require to be proved, as it was alleged, and which to that extent was not material. The same proposition was held in the New York Court of General Sessions, in the case of *People* v. *Campbell*, 4 Parker Crim. R. 387, where it was laid down that the averments in an indictment could not be changed, even by consent of defendant.

The learned judge who presided in the circuit court at the time the change was made in this indictment, says that the court allowed the words "comptroller of the currency and," to be stricken out as surplusage, and required the defendant to plead to the indictment as it then read. The opinion which he rendered on the motion in arrest of judgment, referring to this branch of the case, rests the validity of the court's action in permitting the change of the indictment upon the ground that the words stricken out were surplusage, and were not at all material to it, and that no injury was done to the prisoner by allowing such change to be made. He goes on to argue that the grand jury would have found the indictment without this language. But it is not for the court to say whether they would or not. The party can only be tried upon an indictment as found by such grand jury, and especially upon all its language found in the charging part of that instrument. While it may seem to the court, with its better instructed mind in regard to what the statute requires to be found as to the intent to deceive, that it was neither necessary nor reasonable that the grand jury should attach importance to the fact that it was the comptroller who was to be deceived, yet it is not impossible nor very improbable that the grand jury looked mainly to that officer as the party whom the prisoner intended to deceive by a report which was made upon his requisition and returned directly to him. As we have already seen, the statute requires these reports to be made to the comptroller at least five times a year, and the averment of the indictment is that this report was made and returned to the officer in response to his requisition for it. How can the court say that there may not have been more than one of the jurors who found this indictment who was satisfied that the false report was made to deceive the comptroller, but was not convinced that it was made to deceive anybody else? And how can it be said, that with these words stricken out, it is the indictment which was found by the grand jury? If it lies within the province of a court to change the charging part of an indictment to

suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggest changes, the great importance which the common law attaches to an indictment by a grand jury as a prerequisite to a prisoner's trial for a crime, and without which the constitution says "no person shall be held to answer," may be frittered away until its value is almost destroyed.

The importance of the part played by the grand jury in England can not be better illustrated than by the language of Justice FIELD, in a charge to a grand jury, reported in 2 Sawy. 667. "The institution of the grand jury," he says, "is of very ancient order in the history of England—it goes back many centuries. For a long period its powers were not clearly defined; and it would seem from the accounts of commentators on the laws of that country, that it was first a body which not only accused, but which also tried, public offenders. However this may have been in its origin, it was at the time of the settlement of this country an informing and accusing tribunal only, without whose previous action no person charged with a felony could, except in certain special cases, be put upon his trial. And in the struggles which at times arose in England between the powers of the king and the rights of the subject, it often stood as a barrier against persecution in his name; until, at length, it came to be regarded as an institution by which the subject was rendered secure against oppression from unfounded prosecutions of the crown. In this country, from the popular character of our institutions, there has seldom been any contest between the government and the citizen which required the existence of the grand jury as a protection against oppressive action of the government. Yet the institution was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offences upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity. No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body of the district shall declare, upon careful deliberation under the

solemnity of an oath, that there is good reason for his accusation and trial."

The case of *Hurtado* v. *People*, 110 U. S. 516, 4 Sup. Ct. Rep. 111, was a writ of error to the supreme court of that state by a party who had been convicted of the crime of murder in the state court upon an information instead of an indictment. The writ of error from this court was founded on the proposition that the provision of the fourteenth amendment to the constitution of the United States, that no state "shall deprive any person of life, liberty, or property without due process of law," required an indictment as necesary to due process of law. This court held otherwise, and that it was within the power of the states to provide punishment of all manner of crimes without indictment by a grand jury. The nature and value of a grand jury, both in this country and in the English system of law, were much discussed in that case, with reference to Coke, Magna Charta, and to other sources of information on that subject, both in the opinion of the court and in an exhaustive review of that question by Mr. Justice HARLAN in a dissenting opinion.

It has been said that, since there is no danger to the citizen from the oppressions of a monarch, or of any form of executive power, there is no longer need of a grand jury. But whatever force may be given to this argument, it remains true that the grand jury is as valuable as ever in securing, in the language of Chief Justice SHAW, in the case of *Jones* v. *Robbins*, 8 Gray 329, "individual citizens from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial before a probable cause is established by the presentment and indictment of such a jury; and in case of high offences it is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions."

It is never to be forgotten that in the construction of the language of the constitution here relied on, as, indeed, in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument. Undoubtedly the framers of this article had for a long time been absorbed in considering the arbitrary encroachments of the crown on the liberty of the subject, and were imbued with the common-law estimate of the value of the grand jury as part of its system of criminal jurisprudence. They, therefore, must be un-

derstood to have used the language which they did in declaring that no person should be called to answer for any capital or other wise infamous crime, except upon an indictment or presentment of a grand jury, in the full sense of its necessity and of its value. We are of the opinion that an indictment found by a grand jury was indispensable to the power of the court to try the petitioner for the crime with which he was charged. The sentence of the court was that he should be imprisoned in the penitentiary at Albany. The case of *Ex parte Wilson*, 114 U. S. 418, 5 Sup. Ct. Rep. 935, and the later one of *Mackin* v. *U. S.*, 6 Id. 777, establish the proposition that this prosecution was for an infamous crime within the meaning of the constitutional provision.

It only remains to consider whether this change in the indictment deprived the court of the power of proceeding to try the petitioner and sentence him to the imprisonment provided for in the statute. We have no difficulty in holding that the indictment on which he was tried was no indictment of a grand jury. The decisions which we have already referred to, as well as sound principle, require us to hold that after the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment, as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the constitution places upon the power of the court, in regard to the prerequisite to an indictment in reality no longer exists. It is of no avail, under such circumstances, to say that the court has jurisdiction of the person and of the crime, for, though it has possession of the person, and would have jurisdiction of the crime, if it were properly presented by indictment, the jurisdiction of the offence is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment. If there is nothing before the court which the prisoner, in the language of the constitution, can be "held to answer," he is then entitled to be discharged so far as the offence originally presented to the court by the indictment is concerned. The power of the court to proceed to try the prisoner is as much arrested as if an indictment had been dismissed or a

nolle prosequi had been entered. There was nothing before the court on which it could hear evidence or pronounce sentence. The case comes within the principles laid down by this court in *Ex parte Lange*, 18 Wall. 163; *Ex parte Parks*, 93 U. S. 18; *Ex parte Wilson*, 114 U. S. 418, 5 Sup. Ct. Rep. 935, and other cases.

These views dispense with the necessity of examining into the questions argued before us concerning the formation of the grand jury and its removal from place to place within the district. We are of opinion that the petitioner is entitled to a writ of *habeas corpus* and it is accordingly granted.

In the particular case the Supreme Court of the United States reviews the action of a Circuit Court of the United States in a criminal case. It is not very often that a criminal case finds its way to the Supreme Court of the United States, and when it does the decision of that court is usually worthy of especial attention.

I. The laws of the United States do not provide for writs of error to the Supreme Court from final judgments in any criminal case. The Circuit Courts of the United States consequently exercise a final jurisdiction in criminal cases, even though life itself may be at stake. While this is so the particular case shows that under certain circumstances the action of the Circuit Courts in criminal cases may be reviewed by the Supreme Court. This case illustrates the principle that while a writ of error will not lie to enable the Supreme Court to review a judgment of a Circuit Court in a criminal case upon the ground of error in its proceedings, yet that court may issue its writ of *habeas corpus* and discharge a prisoner held under an erroneous judgment of the Circuit Court when it appears that that court had no jurisdiction to render the judgment.

There is also another mode by which the Supreme Court may review the decision of a Circuit Court in a criminal case. The laws of Congress provide that whenever any question shall occur before the Circuit Court, upon which the opinions of the judges shall be opposed, the point upon which the disagreement shall happen shall, during the same term, upon request of either party, or their counsel, be stated, under direction of the judges, and certified, under the seal of the court, to the Supreme Court, at their next session to be held thereafter, and shall by said court be finally decided.

Under this provision that court has in a number of cases been called upon to pass on questions of criminal law. But to enable a question to be thus certified to the Supreme Court upon a certificate of a division of opinion, the difference of opinion must be a real one and not merely *pro forma*, see *Webster* v. *Cooper*, 10 How. 64.

It was at one time matter of great doubt whether the Supreme Court had a right to assume this appellate jurisdiction over the circuit courts by granting writs of *habeas corpus*, as above referred to. Mr. Justice CURTIS of that court has said that great diversity of opinion in reference to the matter existed amongst the judges of the court. But the famous case of *Ex parte Yerger*, 8 Wallace 85 (1868), settled the principle that the court possessed such appellate power. The opinion of the Chief Justice in that case also shows the diversities of opinion which had existed up to that time in regard to the matter. The existence of the power was justified under a provision of the judiciary act of 1789, authorizing the court to issue any writ necessary for the exercise of its jurisdiction.

The case of *Ex parte Royall*, 117 U. S. 241 (1885), decided that a federal court might release on a *habeas corpus* a person held in custody under a state law in violation of the constitution or laws of the United States. But it is discretionary with the court whether it will exercise the power. "This court holds that when a person is in custody, under process from a state court of original jurisdiction, for an alleged offence against the laws of such state, and it is claimed that he is restrained of his liberty in violation of the constitution of the United States, the circuit court has a discretion, whether it will discharge him, upon *habeas corpus*, in advance of his trial in the court in which he is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the state court shall have finally acted upon the case, the circuit court has still a discretion whether under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the state, or whether it will proceed by writ of *habeas corpus*, summarily to determine whether the petition is restrained of his liberty in violation of the Constitution of the United States." And the opinion seems to be that while this is a discretionary power, yet as a general rule it is not well to exercise it in advance of the trial in the state court.

While a federal court may release on a *habeas corpus* a prisoner held in custody under a state law, a state court cannot release a person held in custody under the laws of the United States. If a writ of *habeas corpus* is served by authority of a state court on one detaining a prisoner for an offence against the laws of the United States, it is the duty of the person on whom it is served to make known to the state court the authority by which the prisoner is held, but at the same time not to obey the process of the state court: *U. S.* v. *Booth*, 21 How. 506 (1858); and *Tarble's Case*, 3 Wall. 397 (1871).

II. The Fifth Amendment of the Constitution of the United States provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in certain cases not necessary to be mentioned here. The meaning of the word "infamous" in this provision received an authoritative exposition in *Ex parte Wilson*, 114 U. S. 417 (1885). Prior to the decision in that case, there had been a number of decisions in the federal courts sustaining prosecutions by information for any crime a conviction of which would not at common law have disqualified the convict to be a witness: *United States* v. *Shepard*, 1 Abbott U. S. 431 (1870); *United States* v. *Maxwell*, 3 Dillon 275 (1875); *United States* v. *Block*, 4 Sawyer 211 (1877); *United States* v. *Miller*, 3 Hughes 553 (1878); *United States* v. *Baugh*, 4 Id. 501 (1880); *United States* v. *Yates*, 6 Fed. Rep. 861 (1881); *United States* v. *Field*, 21 Blatchf. 330 (1883); *In re Wilson*, 18 Fed R. 33 (1883). But in *Ex parte Wilson*, *supra*, the Supreme Court declared its opinion to be that the competency of the defendant, if convicted, to be a witness in another case, was not the true test, and it held that no person could be held to answer without presentment or indictment by a grand jury, for any crime for which an infamous punishment could be imposed by the court.

What punishments are to be considered as "infamous?" In the case above referred to, the Supreme Court, through Mr. Justice GRAY, writing the opinion, says: "What punishments shall be considered as infamous may be affected by the changes of public opinion from one age to another. In former times, being put in the stocks was not considered as necessarily infamous. And by the first judiciary act of the United States, whip-

ping was classed with moderate fines and short terms of imprisonment. * * * But at the present day either stocks or whipping might be thought an infamous punishment." The judgment of the court in that case was that a crime punishable by imprisonment for a term of years at hard labor was an infamous crime within the meaning of the constitutional provision already referred to.

In *Mackin* v. *United States*, 117 U. S. 348 (1885), the court re-affirmed the opinion expressed in *Ex parte Wilson*, that imprisonment at hard labor in a state prison was an infamous punishment, and in addition thereto held that imprisonment in a state prison or penitentiary, with or without hard labor, was an infamous punishment. When such a punishment can be imposed, the proceeding cannot be by information.

The same court, in *Hurtado* v. *California*, 110 U. S. 516 (1883), decided that the provision of the Fourteenth Amendment, which forbids any state to "deprive any person of life, liberty or property, without due process of law," did not require an indictment by a grand jury in a prosecution for a capital crime in a state court. The same question had been before the Supreme Court of Wisconsin in *Rowan* v. *State*, 30 Wis. 129, 144 (1872), and had been decided in the same way. And so, too, was the case of *Kalloch* v. *Superior Court*, 56 Cal. 229 (1880).

III. The ruling of the court to the effect that an indictment cannot be amended by the court, is clearly in conformity to a well established principle of the common law. The authorities are cited in the opinion in the particular case, and it will not be necessary to examine that subject farther. It is equally plain, that while at common law an indictment cannot be amended, the caption of an indictment may be amended, as that is, strictly speaking, no part of the indictment itself: *State* v. *Williams*, 2 McCord (So. C.) 301 (1822); *State* v. *Jones*, 9 N. J. Law 2 (1827); *Moody* v. *State*, 7 Blackf. (Ind.) 424 (1845); *State* v. *McCarty*, 3 Pinney (Wis.) 514 (1850); *Allen* v. *State*, 5 Wis. 337 (1856); *State* v. *Useful Manufacturers' Society*, 42 N. J. L. 504 (1880). The common law, forbidding the amendment of indictments, has been changed in England by statute, power being given to the courts to make amendments thereto. See 14 and 15 Vict. c. 100. But it would seem that the legislative power in this country could not authorize the courts to make amendments to indictments in those states where constitutional provisions secure to accused persons a trial "on a presentment or indictment of a grand jury," and not otherwise. Mr. Bishop thinks it difficult to resist the conclusion, that "if a statute should authorize a material amendment to be made in an indictment for an offence which, by the constitution of the state was punishable only by indictment, the statutory direction would be a nullity."

Bishop's Cr. Procedure (2d ed.) § 97. The Supreme Court of Mississippi, in 1876, in *Miller* v. *State*, 53 Miss. 403, sustained a statute authorizing the amendment of indictments. In the course of the opinion the court says: "It would not be competent to change the indictment so as to charge a distinct and different offence from that preferred by the grand jury; but when the amendment is merely to state truly the name of the person for an injury to whom the grand jury indicted the accused, it is not obnoxious to constitutional objection. The amendment may be made to state truly and describe accurately the *particular* (the italics are the court's) *and identical offence for which the grand jury indicted*, but not to charge one for which the grand jury had not indicted. The statute allows the court, on trial of an indictment for any offence, to cause an amendment to be made, not to introduce another and distinct offence, but to accurately describe and particularly identify, as to names,

the very offence charged, 'if it shall consider such variance' (as disclosed by evidence) 'not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on the merits;' and this is to be on such terms as to postponing the trial (lest surprise may work injury to the defence) to be had before the same or another jury, as such court shall think reasonable; and the action of the court, both in ordering an amendment and refusing a continuance on that ground, is made the subject of review by the Supreme Court. Thus limited and guarded, we do not think this power is extra-constitutional. To make certain and precise the charge in an indictment is an advantage to the defendant; and, so long as the exercise of the power is confined to truly and precisely identifying and particularizing the very offence indicted for, it violates no right, and does no harm, provided due respect is had to the limitations and conditions by which it is guarded by the statute. It is undoubtedly a very delicate power, and should be employed cautiously and with scrupulous regard to the defence on the merits, and on such terms as to preclude the possibility of the slightest harm to such defence." No authorities are examined or cited by the court in its opinion, but the opinion is followed in *Peebles* v. *State*, 55 Miss. 434 (1877), and in *Blumenberg* v. *State*, 55 Miss. 528 (1878).

The Constitution of Michigan provides that "in every criminal prosecution, the accused * * * shall be informed of the nature of the accusation." In *Brown* v. *People*, 29 Mich. 232 (1874) counsel argued that this provision made it impossible for the legislature to alter in any respect the common-law form of charging an offence. The question came up in the case of an information, informations taking the place of indictments in Michigan. The opinion of the court was written by Mr. Justice CHRISTIANCY, and it concedes that it would not be competent for the legislature to authorize any form of charging an offence, which should not inform the accused substantially of the nature and character of the particular offence intended to be proved against him, and then goes on to say: "But this provision of the constitution was not intended to prevent the legislature from dispensing with matters of form only, in the description of an offence, nor with any degree of particularity or specification in the description which did not give the defendant any substantial and reliable information of the particular offence intended to be proved, and without which he would receive substantially the same information."

The opinion is also expressed that as a general rule it would not be competent for the legislature to authorize a form of charging the offence by an information, which would give the defendant less real and substantial information of the nature of the offence than was indispensable in an indictment at common law, but at the same time the court was not prepared to say that this was a universal rule applicable to all cases. In the subsequent case of *People* v. *Olmstead*, 30 Mich. 431 (1874), the court again passed on the same constitutional provision, and held that statutes simplifying the forms of information must be confined to the omission only of such matters as are not essential to give information of the nature of the accusation.

In *McLaughlin* v. *The State*, 45 Ind. 338 (1873) the Supreme Court of Indiana passed on the provision in the constitution of that state securing to accused persons the right "to demand the nature and cause of the accusation against him," and it held that the legislature had not the power to dispense with such allegations in an indictment as an essential to reasonable particularity and certainty in the description of the offence. In *State* v. *O'Flaherty*, 7 Nev. 157 (1871) the court say: "The power of the legislature to mould and fashion the form of an in-

dictment is plenary. Its substance, however, cannot be dispensed with."

On this same subject we would call attention to the following cases. *Leasure* v. *State*, 19 Ohio St. 49 (1869); *State* v. *Manning*, 14 Texas 402 (1855); *People* v. *Mortimer*, 46 Cal. 114 (1873); *State* v. *Learned*, 47 Me. 426 (1859); *State* v. *Corson*, 59 Id. 137 (1871); *Com.* v. *Holley*, 3 Gray 458 (1855).

HENRY WADE ROGERS.

Court of Appeals of New York.

GIFFARD, RECEIVER, *v.* CORRIGAN, EXECUTOR.

The bare fact that a deed has been recorded is not sufficient evidence that it was delivered by the grantor, or accepted by the grantee or beneficiary. To establish these facts there must be other and further evidence that will support such a presumption, as that the deed would operate beneficially to the grantee, or that he had knowledge of the execution or recording of the deed.

THE opinion of the court was delivered by

ANDREWS, J.—The defendant McCloskey, in his verified answer, denied that he entered into the covenant of assumption contained in the deed executed by McEvoy, and alleged that the deed was made and executed without his knowledge, and that it was never delivered to or accepted by him. The parties proceeded to trial upon the issue so presented, and the other issues in the case. The plaintiff put in evidence from the register's office in West Chester county, the record of a deed dated May 8th 1878, recorded May 10th 1878, from McEvoy to the defendant, McCloskey, purporting to convey to "John McCloskey, Archbishop of New York," for the nominal consideration of one dollar, the mortgaged premises and a lot adjacent thereto, which deed contained a covenant on the part of the grantee, to assume and pay the principal sum of $3900 on the mortgage, with interest from January 9th 1869. The deed was executed by the grantor alone. The plaintiff rested his case against the defendant, McCloskey, solely upon the record. The case is bare of any circumstance or evidence showing, or tending to show, that the defendant, McCloskey, had any knowledge or information of the existence of the deed, or indeed of the existence of the mortgaged property prior to the commencement of the action, or that he was ever in possession, or that he ever had any conversation or negotiation with any one in respect to the property. There is no evidence who put the deed upon record, or how it came to be recorded. The bare fact of the record is all that appears connecting the defendant, McCloskey, with the transaction. The